III. METHODOLOGY

Ivy Planning Group, LLC conducted 150 telephone interviews during a four-month period.[15] The study analyzes these interviews, 123 of which were with key persons[16] representing small, minority- and women-owned businesses that attempted to acquire, sell or transfer a license during the years 1950 to present, irrespective of success; and 27 of which were with "key market participants"[17] active in the broadcast and/or wireless markets during the same time frame.[18]

We selected a total of 150 interviewees to enable us to talk to a meaningful cross-section of participants in the licensing process from 1950 to present. (See Appendix C for a chart highlighting the demographic breakdown of the interviewees).

Using a knowledge of the market and random sampling, a list of interviewees was compiled relying upon various sources.[19] Approximately half of the interviewees who were licensees were selected based on their role and significance in the industry. The balance of the licensees and unsuccessful applicants were selected at random from the information sources available to us.

As we compiled the list of interviewees, we made every effort to ensure representation by year, method of license acquisition, type of license, type of FCC acquisition rules, race/ethnicity, gender, and size of business. We acquired some of this information through the aforementioned data sources; our initial conversations with prospective interviewees provided us with the remainder.

The list of key market participants was comprised of a sample of people who are known to have had a significant role in the industry and those participants whose names arose during the

[15] *See Appendix* C for a copy of the Interview Guide.

[16] "Key persons" are defined as those who: (1) have voting control or an equity interest in the company which holds the license and (2) were a driving force behind the company's acquisition of or attempt to acquire a FCC license on either the primary or secondary market.

[17] "Key market participants" are defined as those individuals who act in an intermediary capacity with respect to FCC broadcast and wireless license acquisition (e.g., media brokers, lenders, venture capitalists, investment bankers, and attorneys) or who are or were part of the FCC (e.g., former Commissioners, Directors, staff members).

[18] With the consent of the interviewees, telephone interviews were recorded and subsequently transcribed. Parenthetical notations after each quote in this document refer to the particular transcript file and page number(s) from which the quote was taken.

[19] Sources used included the following: FCC database and other information; National Telecommunications and Information Administration (NTIA) Minority Commercial Broadcast Ownership Report, 1997-1998; Broadcast Investment Analysts (BIA) databases; American Women in Radio and Television (AWRT); National Association of Black-Owned Broadcasters (NABOB); and referrals from interviewees.

interview process. Key market participants and current licensees identified earlier generations of licensees and applicants.

As a further part of the study, Ivy developed a timeline of key statutory, regulatory and historical developments which have affected the efforts of small, minority- or women-owned businesses to obtain licenses in both the primary and secondary markets. The timeline includes rules, policies, court cases, and statutory regulations that impacted comparative hearings, lotteries, auctions, bidding credits, tax certificates, and distress sales. Further, the timeline includes the number of small, women and minority licensees for selected years between 1950 and present, when available. (The Historical Timeline is attached as Appendix A.)

The analysis of the interviews combined with the information contained in the historical timeline form the basis of this report.

IV. FINDINGS

A. Overview

The findings of this study may assist the FCC in fulfilling its statutory mandate regarding market entry barriers. Section 257 of the 1996 Act mandates that the Federal Communications Commission ("FCC" or "the Commission") identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."

In carrying out the mandate, Section 257(b) states that the Commission "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity." In addition, Section 309(j) of the Communications Act of 1934 requires the FCC to further "economic opportunity for a wide variety of applicants, including businesses owned by members of minority groups and women."

The study's findings highlight significant barriers to entry for small businesses including minority- and women-owned businesses. The interviewees uniformly reported that the combination of these barriers has impeded and in many instances precluded these entities from entering, successfully competing and surviving in the broadcast and wireless industries. Interviewees specifically identified the following as market entry barriers.

- Discrimination in the capital markets causing limited access to adequate and affordable debt and equity capital for minority- and women-owned businesses;
- Discrimination from the advertising industry against minority-formatted and -owned stations resulting in decreased opportunity for revenue generation, cash flow and access to capital;
- Exclusion of minority- and women-owned businesses from the powerful network of information, deals and deal makers thereby limiting access to license purchase opportunities and the capital to fund them;
- Market deregulation and consolidation following the 1996 Act resulting in increased competition for national advertising dollars, inflated purchase prices for stations and a loss of diversity of voices and community focus;
- Lack of industry experience for women and minorities resulting from too few employment opportunities offered by majority broadcasters and the uneven enforcement by the FCC of its EEO policies, thus rendering these groups ill-prepared to compete in a marketplace where industry experience and successful track records are critical elements for market entry and acquisition of capital;

- Fractured or lack of advocacy by and on behalf of small, minority- and women-owned communications businesses before and within the FCC, the courts and Congress, thereby leaving the special needs of these licensees under-represented when new rules, policies and laws are proposed;
- A series of FCC actions and inactions which have proven very costly for small, minority- and women-owned businesses, who could ill-afford the added financial burden, and have frequently had a discriminatory impact on these business owners, albeit purportedly unintentional; and
- Misuse of minority and gender ownership policies by majority firms, to the disadvantage of "real" minority and female ownership.

This study covers both broadcast and wireless licensing. Background information on each is presented below to provide context for the discussion of the findings.

1. Broadcasting

Small, minority- and women-owned broadcast licensees and those wanting to enter into broadcasting face significant barriers to entry and growth in today's market. While there have always been challenges, and especially for women and minorities, the relaxation of ownership restrictions or "caps" by the 1996 Act has changed the landscape of broadcast properties because the statute allows a single entity to own, given the applicable market, a larger number of stations nationwide.

Historically, small broadcasters have served their local markets with a commitment to provide service to their respective geographic or demographic communities, gaining advertising revenue from both national and local businesses. From 1950 until 1985, there was healthy competition among broadcast stations. An individual or company could own *only* one AM, FM and television station in each market and a total of seven of each type nationally.[20] In stark contrast,

[20] In 1985, while the rules generally stayed the same with respect to local ownership, the Commission relaxed the rules so that an individual or company could own as many as 12 AM, FM or TV stations in the national market under certain circumstances. In addition, since 1985, the Commission has gradually relaxed the ownership rules. In 1992, one could own 2 AM and 2FM stations, in markets with 15 or more stations, provided the combined share of audience is less than 25%; in markets that have less than 15 stations, 3 stations with no more than 50% of the market's stations. In the national market, an owner could own 18 AM and 18FM stations, plus a non-controlling interest in 3 AM and 3 FM, provided they are controlled by minorities. Thereafter, in 1996, the Commission removed the ownership restriction allowing no numerical-station limit, but limiting the audience reach to 35% as to the national market. The FCC also relaxed the local ownership rules:

(a) 8 stations in markets with 45 or more stations (with no more than 5 stations in AM or FM;
(b) 7 radio stations in markets with 30-44 stations (with no more than 4 in either service);

today, an individual or company can own as many as 8 stations locally, based on the total number of stations in the local market; and there is no numerical limit in the national market but a limit on audience reach. In earlier years when there were more stringent restrictions on broadcast ownership, small business owners were at least making a living. Now it is significantly more difficult to do so.

While a number of interviewees had acquired their licenses through the FCC's comparative hearing process[21], most of the study participants had purchased their stations from previous license holders. Many of those stations had inferior signals and were purchased out of

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(c) 6 radio stations in markets with 15-29 stations (with no more than 4 stations in either service); and

(d) in markets with less than 15 stations, 5 radio stations (with no more than 3 stations in either service.

[21] In accordance with the Communications Act of 1934, The Federal Communications Commission has allocated and licensed the radio spectrum for use in radio, television and telecommunications. From 1945 until 1993, this spectrum was allocated by comparative hearings from which the successful applicant paid no compensation to the Federal government. If there were mutually-exclusive competing applicants, they went through the comparative hearing process wherein an Administrative Law Judge (ALJ) reviewed the applications and heard the arguments from the applicants, ultimately deciding which one could and would best serve the public interest. While the applicants generally expended significant sums of money for engineering advice and legal representation during the application and hearing process, regulatory and application fees were minimal.

In an effort to refine the process and to provide consistency in decision making, the Commission issued the Policy Statement on Broadcast Comparative Hearings, 1 F.C.C. 2d 393 (1965). This Statement articulated the areas in which applicants would receive credit (or "points") and on which their applications would be judged. The seven areas of review were: diversification of control, integration of ownership into management, proposed program service, past broadcast record, efficient use of the frequency, character, and any other significant and relevant factors to be considered in the decision-making process.

Minority ownership policies did not commence until 1973 in the wake of *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973); and gender ownership policies did not commence until 1978 and the *Mid-Florida Television Corp.*, 69 F.C.C. 2d 607, 651 (Rev. Bd. 1978), set aside on other grounds, 87 F.C.C. 2d 203 (1981).

The 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities formalized the use of minority and gender credits in the comparative hearing process, thereby providing a measure of "preference" to both minority and female applicants. In 1990, the FCC declined to extend enhancement credits for minority ownership under the diversification of ownership criterion. The 1993 decision, *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), had the effect of freezing comparative hearings. The Telecommunications Act of 1996 eliminated the role of comparative hearings in the renewal of broadcast licenses.

bankruptcy, with the new owner, in his or her eagerness to own a station, sometimes taking on more debt than was prudent.

Access to capital, on a timely basis and in quantities needed to acquire and grow their businesses, has always been a challenge for small broadcasting businesses. Local banks often did not lend on broadcast properties because bankers did not understand the business of radio and television, saw the licenses as too risky (especially since they were not actually owned by the broadcaster and came up for renewal on a regular basis), and were unable and/or unwilling to collateralize their loans with the generally meager assets of the stations themselves. If broadcasters were able to get loans from conventional lenders, often other personal assets had to be pledged as collateral. If one was lucky, the seller of the station was willing to take back a note for a portion of the purchase price.

The interviewees consistently reported that for minority and women licensees these market entry barriers have been compounded by the discrimination they have encountered in the capital markets, in the broadcasting industry itself, in the advertising industry, in the lack of employment opportunities, and as a result of various actions and inaction on the part of the FCC and Congress.

The 1996 Act has heightened these barriers to the point where it appears that it is almost impossible for small, minority- and women-owned businesses to enter the broadcast industry. Broadcast ownership is now determined by Wall Street stock instead of Main Street money. With the lifting of the ownership caps, there has been consolidation of ownership, primarily in radio, by large publicly-traded companies, driving prices up and smaller, independent owners out. Where stations used to sell for between seven and twelve times projected cash flow, prices have now been inflated to 20-22 times cash flow. Without significant equity capital, either from personal funds or outside investors, it is virtually impossible for individuals and non-public companies to acquire stations in today's market.

The consolidation of stations precipitated by the deregulatory provisions of the 1996 Act has also consolidated advertising revenues in the hands of the large broadcast group owners, significantly limiting the ability of smaller broadcasters to earn the money necessary to successfully compete and survive in the business. As a result, smaller station owners, many of whom are minorities, are being presented with two choices: (1) to continue to operate their stations at personal financial risk, which many have done because of their deep commitment to serve and be a voice for their communities, or (2) to sell their stations, which others have done because they believe that it is going to be extremely difficult if not impossible to compete successfully against these large group owners in the future.

With the exit of local, minority radio station owners, consolidation is also having an impact on both the diversity of voices and service to the local communities. With consolidation, the programming, both entertainment and public interest, has become more homogenized. While group owners might have urban-formatted ("Black") stations, for example, in particular markets, interviewees indicated that it is common for the news and community service programming provided by these stations to not be particularly geared towards the information needs of that specific Black community itself.

Additionally, since news programming was often being produced centrally by the larger companies whose stations covered multiple markets, access by the audience to general local news and public service announcements was diminished. Lastly, fewer opportunities exist for the voice of the minority population to be heard since some minority on-air personalities and other employees are being precluded by their employers from taking public stands on issues relative to their minority group.

These market entry barriers have been exacerbated by the FCC's action, or inaction, on certain regulatory or market issues. For example, they may include enforcement or unenforcement of EEO policy, distress sales/license renewals[22], use by non-minority men of minority and female "fronts" during the comparative hearing process[23], the lifting of the ownership caps, and minimal small business advocacy before the FCC. The actions and inactions of the FCC have been made worse with Congress' repeal of the tax certificate program.[24]

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[22] The 1978 Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d at 981, 42 Rad. Reg. 2d (P & F) at 1691, created the Distress Sale policy which allowed for license owners that were under scrutiny by the FCC (and under threat of license revocation) to sell their station to a minority for 75% of the appraised value. In return, the FCC would cease its inquiry into the suspect license owner.

[23] Interviewees reported that in some instances non-minority men would offer ownership and/or financial resources to minorities and women to become part of their license application team in order to take advantage of the minority and women ownership programs during the comparative hearing process, but rarely giving these "fronts" control over the operation of the business. In these instances, their participation was generally sought after to increase the odds of license award. Alternatively, others would review FCC filings to see if a minority or woman had filed for a new frequency. The apparent motivation was either to: (a) get paid off with "greenmail" to withdraw their application, knowing full well that most women and minorities did not have the resources for a protracted hearing before the Commission and would therefore pay the greenmailer to go away; or (b) come in on the back of someone else's engineering study and wear down the minority or female applicant through appeals or other means, expecting that this applicant would eventually withdraw because he/she did not have the money for a protracted hearing process, thereby leaving the non-minority in a position to receive the license. There were instances where these practices, as described, were quite predatory in their nature.

[24] The 1978 Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d at 981, 42 Rad. Reg. 2d (P & F) at 1691, created the tax certificate program. This program which provided incentives to broadcast owners who sold their properties to minorities (minority buyer with 50.1% of voting control and 20.1% equity interest). The seller could then defer any gain realized on the sale of that broadcast property provided it was sold to a minority, and the gain was rolled over into a qualified replacement broadcast property within 2 years. Specifically, the tax certificate program encouraged and promoted minority ownership by giving a two-year like-kind-transfer tax break for the sale of licenses to minorities if the proceeds were reinvested in a

And finally, the gains in station ownership that had been achieved by minorities in the latter 1970s, 1980s and early 1990s were essentially reversed by both Congress's elimination of the tax certificate program in 1995 and Adarand decision in 1995, discussed supra, which made it significantly more difficult for race-specific rules and policies to be implemented by the FCC.

Given the historical disadvantages faced by small, minority- and women-owned broadcasting businesses, the confluence of the repeal of tax certificates in 1995, the Adarand decision in 1995 and the deregulation of the broadcast industry in 1996, it appears that it is nearly impossible for small, minority- and women-owned broadcasters to enter, survive and grow in the broadcast industry.

2. Wireless

The barrier to entry in wireless licensing is primarily one of capital. With the passing by Congress of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 388 (1993) (codified, in pertinent part, at 47 U.S.C. §390(j) (1994)), the FCC was given the authority to distribute licenses through a competitive bidding process, or auction. With the enactment of Section 309(j) of the Communications Act, successful license applicants have to pay the FCC for the issuance of wireless licenses whereas before they were issued at no charge to the licensee.[25]

The financial burden of now having to pay for licenses coupled with 1) the enormous sums of capital needed to build out wireless systems and 2) limited access to capital, has severely disadvantaged small, minority- and women-owned businesses in the acquisition of wireless licenses.

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similar communications industry. Since the seller was able to defer its tax payment on the capital gain by selling to a minority, the price was frequently lowered, enabling minority purchasers to mitigate the associated barrier of "lack of access to capital."

Prior to 1978, minorities owned approximately 40 broadcast licenses, one-half of one percent of approximately 8,500 total broadcast licenses granted by the Commission. From 1978 to 1995, the FCC granted approximately 356 tax certificates to promote minority broadcast and cable ownership (287 radio, 40 TV and 30 cable licenses). This program helped give a much needed boost for minority ownership. In 1982, the tax certificate program was expanded to include cable systems. Subsequently, Congress repealed the tax certificate program with the passing of the Self-Employed Persons Health Insurance Act of 1995, Pub L. No. 104-7, S 2, 109 Stat. 93 (1995).

[25] On August 18, 1998, the Commission released its First Report and Order setting forth procedures governing auctions of broadcast service licenses. In October 1999, the FCC held its first auction for broadcast licenses whose distribution was suspended in the wake of the *Bechtel* case.